



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Criminal Appeal 127 of 2008**

SK.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant SK was convicted by Bungoma Resident Magistrate of the offence of defilement of a girl contrary to section 8 (1) (2) of the Sexual Offences Act No.3 of 2006. He was sentenced to serve thirty (30) years imprisonment. His petition of appeal shows that the Appellant is aggrieved by both the conviction and sentence.

The grounds are that the trial court failed to consider that the Appellant was over-detained in police custody before being charged. Secondly, that he was convicted on insufficient evidence. Thirdly, the Appellant states that his defence was not considered and finally, that he was not medically examined to lay a basis for connecting him with the offence.

The appeal was opposed by the state on ground that there was sufficient evidence to convict. The state submitted that the Appellant was arrested on a Friday and only spent the weekend in custody. Mr. Ogoti called upon the court to correct the sentence in accordance with section 8 (2) of the Act. He condemned the act of the Appellant as beastly.

As the first appeal court, I will proceed to evaluate the evidence and make my own findings as I delve into the issue of whether the Appellant was rightly convicted and sentenced.

PW1 was the complainant aged ten (10) years who gave unsworn evidence. She told the court that on the material date (25/08/08) she was in the home of her cousin C at around 8.00 p.m. The appellant who is the husband of C, sent his wife to buy herself some medicine at a chemist in Bungoma town. When C left, the complainant was holding C's baby at the door of the house. PW1 had been sent to the home by her mother (PW2) to help in taking care of the baby during school holidays. The Appellant grabbed the baby from PW1 and took it to the bedroom. He got hold of PW1 and put her on the floor. He undressed her and had carnal knowledge of her. There was a lamp which was on in the house. When PW1 tried to scream, the Appellant threatened to kill her. He also warned her that if she told anyone what had happened he would kill her. PW1 said the Appellant hurt her seriously during the sexual assault. It was until she went to her home five (5) days later that her mother, PW2 noticed that her daughter walked with some difficulties. PW2 inquired what the problem was. PW1 then narrated the ordeal to her mother. The matter was reported to police and the girl was medically examined. The accused was later arrested and charged with the offence. PW1 was a child of tender years. Her evidence to the court was detailed and clear on what happened to her. She could not scream due to the threats to kill by the Appellant. It appears that the Appellant sent his wife to the chemist to buy medicine at that odd hour in order to get an opportunity to sexually assault the girl. True to the threats, the girl did not tell anybody until she returned to her parent's home. The medical examination was done on 2/9/2008 about seven days after the incident.

PW2 testified that she noticed that PW1 was walking in an awkward manner. On checking her private parts, she found that PW1 had a

smelly discharge. PW3 confirmed that she was sent by the Appellant to buy drugs around 7.30 p.m after the family had taken their supper. She had a bout of malaria and was coughing. When she returned home, she did not know or suspect that there had been a problem. She escorted PW1 back to her mother's home on 31/8/2008. It was after a few days that the Appellant was arrested.

PW5, Dr. Mulianga Ekesa produced the medical examination report of Dr. Mole who had examined PW1. The findings were that the complainant's private parts were swollen and reddened and that she had a smelly discharge from the urethra. A high vagina swob revealed that the girl was infected with gonorrhoea.

In his defence, the Appellant testified that the case was framed against him by his wife PW3 and PW2 the complainant's mother since he has another wife whom PW3 is not happy about. The magistrate did not believe this defence. He rejected it as he observed that PW2 would not stoop that low to use her own daughter to victimize the Appellant. The court observed the demenour of PW1, PW2 and PW3 and came to a conclusion that they were credible witnesses. I entirely agree with those observations and add that the medical evidence dislodges the defence of the Appellant.

The medical evidence and the testimony of PW2 corroborates the evidence of the complainant that she was sexually assaulted by the Appellant. That evidence is fortified by that of PW3. Although the Appellant was not medically examined, the evidence on record proves beyond reasonable doubt that he is the one who defiled PW1. No miscarriage of justice was caused by that omission.

I am satisfied that the Appellant was convicted on very sound evidence which was not challenged by the defence. The conviction is therefore safe.

The Appellant was arrested on 5/9/2008 which was a Friday. He was in the police cells over the weekend during which days the courts were not sitting, He was arraigned in court on 9/9/2008. It is not known what time the accused was arrested on 5<sup>th</sup>. It can only be assumed that he spent only a few hours in custody for that day. On Saturday the 6<sup>th</sup> and Monday the 8<sup>th</sup>, the Appellant spent two full days. Sunday is not included in computation of time. The total hours spent in police custody was slightly over 24 hours. This is excusable and does not amount to violation of the Appellant's Constitutional rights. Assuming that my computation is found to be incorrect, I am aware of the provisions of section 72 (6) of the Constitution which allows the Appellant to sue for compensation. The Appellant did not raise this issue before the trial court and the court would therefore not have dealt with it.

The age of the complainant was confirmed in the medical report and the birth certificate to be ten (10) years at the time the offence was committed. Section 8 (2) of the Sexual Offences Act provides that where one is convicted of defilement of a child of ten years or less, he shall be sentenced to imprisonment for life. The Appellant herein was sentenced to 30 years imprisonment which was wrong. It is my duty to correct the mistake of the trial court which I hereby do.

I find that the appeal has no merit and dismiss it accordingly. The conviction is upheld and the sentence of 30 years imprisonment substituted with life imprisonment.

**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on the 13<sup>th</sup> day of July, 2010 in the presence of the Appellant and the state counsel Mrs. Leting.

**F. N. MUCHEMI**  
**JUDGE**

